NO. 22315

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK ZAVLANES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in the one-count indictment, following trial by jury [C.T. 62].[1/]

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2312 and 3231. Jurisdiction of this court rests pursuant to Title 28, United States Code, Section 1291 and 1294.

1/ "C.T." refers to Clerk's Transcript

II

STATEMENT OF THE CASE

Appellant was charged in the one-count indictment returned by the ederal Grand Jury for the Southern District of California. The indictment lleged that appellant knowingly and intentionally transported in interstate ommerce a stolen 1964 Oldsmobile automobile from Kansas City, Missouri o San Diego County, California and the appellant then knew the motor ehicle to have been stolen. [C.T. 2].

Jury trial of appellant commenced on April 18, 1967 before United tates District Judge James M. Carter. Appellant was found guilty as harged on April 19, 1967 [C.T. 12].

Thereafter on August 29, 1967, appellant was committed to the ustody of the Attorney General for five years and the Court denied a motion or judgment of acquittal and a motion for a new trial [C.T. 67].

Appellant subsequently filed a notice of appeal [C.T. 69].

On August 29, 1967, the Court modified the judgment by adding that he appellant may become eligible for parole at such time as may be deter- ined by the Board of Parole as provided under Title 18, Section 4208(a)(2).

III

ERROR SPECIFIED

Points raised on appeal are paraphrased as follows:

1. The Court improperly admitted Exhibit 9 for lack of foundation.

2. There was insufficient evidence to sustain the conviction.

IV

STATEMENT OF THE FACTS

On Friday afternoon, May 6, 1966, appellant was shown a 1964 white Oldsmobile by William Warren, a salesman for Greenlease Motor Company, Kansas City, Missouri. This was the only Oldsmobile Convertible on the used car lot [R.T. 46].[2/]

Appellant liked the Oldsmobile and wanted permission to take the car on a trial basis. This request by appellant was denied [R.T. 46]. Appellant was not given permission at any time to take the Oldsmobile [R.T. 47].

The car in question was last seen Friday evening by William Davis, another salesman, when the lot was closed [R.T. 34].

The following morning, May 7, 1966, the car was missing from the lot [R.T. 33-34, 37]. William Davis reported the vehicle as stolen to the Kansas City police department [R.T. 42, 77]. Mr. Davis also testified that it was the practice of Greenlease Motor Company to verify the title upon receiving automobiles [R.T. 40].

The stolen report by Mr. Davis was verified by two other officers [R.T. 55,60].

2/ "R.T." refers to Reporters Transcript

Appellant was in possession of the automobile in California in January 967 [R.T. 16]. Appellant concedes that he drove the automobile, in question, California [A.B. 4-5].[3/]

The 1964 Oldsmobile Convertible bore Missouri license number K 8-445 [R.T. 59]. This license plate was missing from the automobile of ary Breese of Kansas City, Missouri about November, 1965 [R.T. 19-20]. Ir. Breese first reported the license plate stolen, the next day, but after re-eiving several warrants for tickets, he and Mrs. Breese went to the Main olice Station and reported the plate stolen again [R.T. 19, 20, 24, 160-162]. he second stolen report was dated April 4, 1966 [R.T. 27,28]. Neither Mr. reese nor his wife knew appellant and didn't authorize appellant to use the cense plates [R.T. 21, 159].

Appellant admits to working at Redman Plastics, the same place where ie Breeses' worked [R.T. 103].

Appellant had a bill of sale, Exhibit 4, in his possession showing the ubject vehicle as having been purchased from Nova Car Company, Kansas ity, Missouri on December 4, 1966. Appellant could not explain why this ate was used [R.T. 111-112]. Appellant claimed to have purchased the utomobile about May 10, 1966 [R.T. 85, 104].

Ralph L. Schoonover, Questioned Documents Examiner testified the riginal black carbon had been erased and written over with a blue carbon. He oted the original black carbon showing "4D" for four door had not been

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/ "A.B." refers to Appellant's Brief

erased and "CO" , meaning convertible, had been written in [R.T. 155-157].

Appellant also had a California bill of sale in his possession showing a similar vehicle as purchased from William Reese, 12311 East 24 Highway, Kansas City, Missouri [R.T. 70]. Appellant admits he prepared this document [R.T. 70,100] but told the officers he was just fooling around when he filled out the bill of sale and signed "William Reese" [R.T. 70-71].

Appellant admits to having looked at cars at Greenlease Motor Company [R.T. 110-111].

Appellant testified he traded a De Soto in on the Oldsmobile [R.T.86]. He told his employer, Marvin Barnard, that he traded a Cadillac in on the Oldsmobile and not a De Soto. [R.T. 146]. Appellant says Mr. Barnard is a "real honest person" [R.T. 120].

V.

ARGUMENT

I. EXHIBIT NINE WAS PROPERLY ADMITTED.

Appellant quotes several authoritative sources for the proposition that Exhibit 9 must be authenticated.

Appellant apparently did not consider the "regular course of business" statutory exception to such rule as codified in Title 28, U SCA, Section 1732(a).

In discussing this statute the Supreme C ourt said,

"The several hundred years of history behind the Act (Wigmore, Supra, ¶ 1517-1520) indicate the nature of the reforms which it was

designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed."

Palmer v. Hoffman, 318 U. S. 109, 115 (1942)

In a footnote, at 112, among other things, Judge Learned Hand is ted as saying,

". . .records and records alone, are their adequate repository, and are in practice accepted as accurate upon the faith of the routine itself, and of the self-consistency of their contents. Unless they can be used in Court without the task of calling those who at all stages had a part in the transactions recorded, nobody need ever pay a debt, if only the creditor does a large enough business."

Rule 26, Federal Rules of Criminal Procedure, Title 18, United States e, gives considerable latitude in admitting hearsay evidence that might be admissible under the foregoing section.

See the reasoning in the leading 9th Circuit Case of La Porte v. ted States, 300 F.2d 878 at 882 (1962), and also see United States v. gett, 292 F.2d 415, 423 (5th Cir. 1961).

Or, as in this case, to corroborate the oral testimony of a witness.

United States v. Barnard, 287 F.2d 715 (7th Cir. 1961)

In the case at hand, the car was purchased from an Insurance Company Mr. Hitt. Exhibit 9 corroborates Mr. Hitt's testimony [R.T. 147-152].

ıte Exhibit 9 also corroborates the testimony of Mr. Warren, the automobile lesman. It is contended there was sufficient authentication provided by lliam Warren, the salesman, for Greenlease, who recognized Wilma E. ote's signature as billing clark [R.T. 153]. Mr. Davis, another salesman stified the records in question were kept in the ordinary course of business .T. 38].

Documents may be self-explanatory, that is to say, they may provide ir own authentication.

United States v. Five Boro Construction Company, 310 F.2d 701, 3 (4th Cir. 1962);

McDaniel v. United States, 343 F.2d 785, 788 (5th Cir. 1965);

Carroll v. United States, 326 F.2d 72, 78-79 (9th Cir. 1965)

Even if it were held that Exhibit 9 was not admissible, does not cessarily necessitate a reversal. There must be a showing of prejudice.

Carroll v. United States, supra at 79;

McDaniel v. United States, supra at 788.

There was no showing of prejudice. The evidence was overwhelm- without the documents complained of.

Appellant places great weight to the effect that there is no showing the ents of Greenlease Motor Car Company had authority to bind the company.

Authority to bind the company is not in issue. Persons maintaining cords such as bookkeepers and secretaries may or may not be authorized to id the corporation. The statute merely provides that records maintained in e regular course of business dispenses with the necessity of putting the

uthenticating proof in evidence.

II. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE GUILTY VERDICT.

The law is now clear that on appeal, the evidence is viewed most ıvorable to the government.

Glasser v. United States, 315 U.S. 60, 80 (1942).

Conflicts are thus to be resolved in favor of the government.

Where sufficiency is attacked on no ground other than excludibility f evidence found to be admissible, this defense must obviously fail.

Missouri Pacific Railroad Company v. Austin, 292 F.2d 415, 423, 5th Cir. 1961).

There is no conflict that the vehicle in question, a 1964 Oldsmobile 8 Convertible, was on the used car lot of Greenlease Motor Company, Kansas ity, Missouri, the evening of May 6, 1966 and was missing the next day as estified to by two salesmen of the company [R.T. 33, 34].

There is no dispute, the automobile in question was reported stolen. his was testified to by William Davis, one of the salesmen, Officer Pumphrey, a Mesa Police Department, Gary Samuel, and Ronald Philip Klug, Special gents, Federal Bureau of Investigation.

Appellant concedes he drove the car to California [A.B. 4] and admits e placed the license plate of Gary Eugene Breese on the automobile prior to riving the vehicle in question to California [R.T. 15]. Appellant admitted he

btained the license plate for the purpose of bringing the car to California [R.T. 5]. Appellant testified he borrowed the license plate from Mr. Breese.

Mr. and Mrs. Breese both testified the license plate disappeared from eir car and they first verbally reported it stolen, then later reported it stolen writing, as Exhibit 2. They did not know appellant nor loan him their license ate. [R.T. 20-22, 26-28, 159, 160-163].

Appellant testified he purchased the vehicle in question from Nova ar Company, Kansas City, Missouri, on May 10, or 12, 1966 [R.T. 85,111]. is proof of this other than his own testimony was Exhibit 4, a chattel mortgage rm indicating purchase of the instant vehicle from Nova Car Company. Exhibit showed a date of sale of December 4, 1966. Appellant was unable to explain is date [R.T. 112]. Ralph L. Schoonover, Questioned Documents Examiner, stified many changes had been made to this document and Exhibit 4 had been tered by erasing the original black carbon entries and writing over using blue arbon. He noted that the description of the car was "4D" (four door) in black arbon with "CO" (meaning convertible) written over by blue carbon [R.T. 155-58].

It is noted that appellant also had admittedly prepared a Bill of Sale on California Department of Motor Vehicle Form, Exhibit 5) showing transfer to mself by a Mr. William Reese, Highway Motors, 12311 East 24 Highway, ansas City, Missouri [R.T. 109, 170-71].

Special Agent Klug, Federal Bureau of Investigation, testified he hecked out the address and it was non-existent [R.T. 76].

Appellant further admits that Allied Investment Company told him and

s attorney they had no record of selling him a car [R.T. 112]. If he owed em money for a car as claimed [R.T. 91] they would have a record.

III. SUMMARY.

The evidence shows appellant in recent possession in California of an tomobile stolen in Kansas City, Missouri, which he admits driving to California. ie evidence further shows appellant was at the used car lot just prior to the sappearance of the automobile. Appellant worked at the same place the eeses worked. Appellant had an altered document and another domument, ad- ttedly false, that he made up himself, to show ownership. His explanation was tently unbelievable, particularly with his admitted three prior felony convic- ons. Appellant was, therefore, clearly impeached by his past record and other consistent statements.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the jury erdict of guilty in the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Shelby R. Gott

SHELBY R. GOTT